In the Supreme Court of the United States

## INDEX


| | Page |
|---|---|
| OPINION OF THE COURT BELOW | 1 |
| JURISDICTION | 2 |
| HOW FEDERAL QUESTION IS RAISED | 2 |
| CONSTITUTIONAL PROVISIONS INVOLVED | 3 |
| QUESTION PRESENTED FOR REVIEW | 3 |
| STATEMENT OF THE CASE | 4 |
| REASONS FOR GRANTING THE WRIT | 6 |
| CONCLUSION | 11 |
| APPENDIX: | |
| I | A-1 |
| II | A-13 |
| III | A-14 |
| IV | A-15 |
| V | A-16 |


## CITATIONS


| Cases: | Page |
|---|---|
| *Armco Steel Corp.* v. *State of Michigan*, ....Mich....., 102 N.W. 2d. 552 | 10 |
| *B. F. Goodrich* v. *State*, 38 Wash. 2d. 663, 231 P. 2d. 325, cert. denied, 342 U.S. 876 | 8 |
| *Department of Treasury* v. *Wood Preserving Corporation*, 313 U.S. 62 | 2 |
| *Field Enterprises* v. *State*, 352 U.S. 806, Affirming per curiam 47 Wash. 2d. 852, 289 P. 2d. 1010 | 9 |
| *International Harvester* v. *Department of Treasury*, 322 U.S. 340 | 10 |
| *McCleod* v. *J. E. Dilworth Co.*, 322 U.S. 327 | 4, 6, 9 |

Page

*McGoldrick* v. *Berwind White Coal Mining Co.*, 309 U.S. 33 ..... 2, 10

*McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 309 U.S. 70 ..... 2

*Northwestern States Portland Cement Co.* v. *State of Minnesota*, 358 U.S. 458 ..... 10

*Norton Co. v. Department of Revenue*, 340 U.S. 534 ..... 4, 8, 9

*Robbins* v. *Shelby County*, 120 U.S. 489 ..... 6

*Scripto Inc.* v. *Carson*, 362 U.S. 207 ..... 10

*Western Livestock* v. *Bureau of Revenue*, 303 U.S. 250 ..... 10

Constitution, Statutes and Regulation:

Arizona Revised Statutes, Sections 42-1301, et seq., *Arizona Transaction Privilege Tax* ..... 2

Rules of U. S. Supreme Court, Rule 19 ..... 2

United States Code, Title 28, Section 1257 ..... 2

United States Constitution, Article 1, Section 8, *Interstate Commerce Clause* ..... 2, 3, 6

# In the Supreme Court of the United States

OCTOBER TERM, 1960

NO. .....

STATE TAX COMMISSION OF THE STATE OF ARIZONA, *Petitioner*

v.

THE MURRAY COMPANY OF TEXAS, INC., A CORPORATION, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

Your petitioner prays that a writ of certiorari be issued to review the judgment of the Supreme Court of the State of Arizona entered January 31, 1961.

## OPINION OF THE COURT BELOW

The majority opinion and the dissenting opinion of the Supreme Court of the State of Arizona were filed and entered on March 30, 1960 in the above entitled case numbered 6853 and is reported in 87 Ariz. 268, 350 P.2d 674. A motion for rehearing was denied on April 19, 1960, and the mandate of the Supreme Court of Arizona to the lower court issued on April 27, 1960, giving finality to the decision. The State Tax Commission of the State of Arizona timely petitioned this Court for its writ of certiorari, number 1028, October Term. This Court on October 10, 1960, number 68, October Term 1960, 364 U.S. 289 (Preliminary Print, Advance Pamphlet No. 2), entered its memorandum decision granting the petition for the writ of certiorari. This Court then vacated the judgment of the Supreme Court of the State of Arizona and remanded the case to that court for clarification. The Supreme Court of Arizona issued its opinion in clarification and entered its judgment

reinstating the earlier judgment on January 31, 1961. Therefore, your petitioner now prays that the judgment as clarified be certified to this Court for review. The supplemental opinion of the Supreme Court of Arizona is included herein as Appendix V.

## JURISDICTION

Petitioner asserts jurisdiction under Title 28, Section 1257, United States Code and Rule 19 of this Court upon the grounds that the decision of the trial court and the majority opinion of the Supreme Court of Arizona determined that the imposition of the Arizona Transaction Privilege Tax, Sections 42-1301, et seq., Arizona Revised Statutes, upon respondent for sales of personal property made in Arizona, was prohibited by Article 1, Section 8 of the Constitution of the United States, as being a burden on interstate commerce.

The following cases sustain the jurisdiction of this court:

a. *McGoldrick* v. *Berwind-White Coal Mining Co.*, 309 U.S. 33

b. *McGoldrick* v. *Felt & Tarrant Mfg. Co.*, 309 U.S. 70

c. *Department of Treasury* v. *Wood Preserving Corporation*, 313 U.S. 62

## HOW FEDERAL QUESTION IS RAISED

Respondent, on March 28, 1957, brought suit for Transaction Privilege Taxes which it had paid under protest, pursuant to Section 42-1339 of Arizona Revised Statutes. The sole question in the lower court was whether or not respondent's sales in the State of Arizona, upon which the transaction privilege taxes were levied, were immune from such taxation by reason of Article 1, Section 8 of the Constitution of the United States. This question was raised by respondent in the allegations of its complaint, paragraph V, and paragraph 3 of the Protest attached to said complaint. (See Appendix III). The judgment of the trial court, Maricopa County Superior

Court, Phoenix, Arizona, entered December 23, 1958, was for respondent on precisely this basis, that the taxes levied were an unconstitutional burden on interstate commerce. (See Conclusion of Law No. 8 of said Judgment which is Appendix IV.) The case was appealed to the Arizona Supreme Court and the majority opinion was decided solely on the same grounds as the lower court's decision, that the tax levied upon the respondent's sales in question was an unconstitutional burden on interstate commerce. The dissenting opinion took precisely the opposite view, stating that Article 1, Section 8 of the United States Constitution did not bar the levy of the taxes in question because respondent had engaged in sufficient localized activities in the State of Arizona to sustain a levy of the tax.

This conclusion is reinforced beyond all possible doubt by the clarification opinion rendered in response to the mandate of this court. (Appendix V). In this clarification the Supreme Court of Arizona specifically stated that the sufficiency of the Arizona Transaction Privilege Tax to reach the sales, had they not been interstate, was not at issue. The decision is grounded solely on the holding of the court that the interstate commerce clause of the constitution of the United States protected the sales from state taxation.

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Article 1, Section 8 of the United States Constitution:

> "The Congress shall have the power * * * to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

## QUESTION PRESENTED FOR REVIEW

The precise question in this case is just how far can an out-of-state seller act beyond mere localized solicitation activities before the total picture of his localized activities constitutes a sufficient jurisdictional basis upon which the State of Arizona can levy its

transaction privilege tax upon the sales involved, without such taxation being an unconstitutional burden on interstate commerce. The question which is presented, because of the fact situation involved, falls directly between the decisions of this Court in *McCleod* v. *J. E. Dilworth Co.*, 322 U.S. 327, and *Norton Co.* v. *Department of Revenue*, 340 U.S. 534, and there is no federal or state case directly in point or closely related thereto.

## STATEMENT OF THE CASE

Respondent is a Delaware corporation engaged in the manufacture and sale of cotton gin machinery and steel buildings. Substantially, all its manufacturing activities are carried on in Texas and none in Arizona. Its home office is in Dallas, Texas and it has a branch office in Fresno, California. (A.R. 13).

Respondent has a full-time sales engineer, W. J. Simmons, who solicits all sales made by it in the State of Arizona. He either makes the sale himself or is involved in nearly every sale of respondent's products in this state. (A.R. 15, 65). He is paid on the basis of all sales made by respondent in this state. (A.R. 65). All his orders, however, are accepted in either Fresno, California or Dallas, Texas. All credit processing is done there, and payments are made there also. All products are shipped to the customers F.O.B. Dallas (A.R. 15). Respondent maintains a local office at the offices of Food Machinery & Chemical Corporation, Phoenix, Arizona, and here its representative meets customers, keeps files, dispenses technical assistance, and meets with and directs respondent's erector. Most of respondent's customers are aware of and make contact through this local office. (A.R. 47, 48, 50).

The respondent's erector, a Mr. May, is a full-time employee stationed in Arizona who is highly and specially trained in the operation and erection of cotton gins. He erects and assembles the cotton gins when received here, after being shipped in a knocked down condition. (A.R. 59, 68, 70). Most of his time is spent in

such erection activities but he is available for and spends considerable time repairing and servicing respondent's products for its customers. Respondent's customers are aware this service exists in Arizona and make use of it. (A.R. 68, 70).

Respondent also maintains a stock of repair parts for its products at the same location where its sales engineer has his office, Food Machinery & Chemical Corporation, Phoenix, Arizona. (A.R. 14). This stock of parts is on consignment to that company and it handles all sales and collects Arizona Transaction Privilege Tax on all sales of such parts. The parts, however, belong to respondent. The fact that these repair parts are available locally is known to respondent's customers and a large number of repair parts are there sold. (A.R. 51, 52). For the right to carry such repair parts on consignment, Food Machinery makes available to respondent's sales representative the use of an office, telephone and office equipment. (A.R. 33). This arrangement is carried out in various Food Machinery & Chemical Corporation offices located in other states and thereby creates in each area so served a centralized location for respondent's customers to go for service of all their needs regarding respondent's products. (A.R. 33).

The audit period involved in this case was January 1, 1954, to September 30, 1956, and during this period respondent made sales to Arizona customers of $1,180,621.62 on which an Arizona Transaction Privilege Tax of 2% was paid on $442,864.48 or a total tax paid of $8,857.29. (A.R. 20). Arizona Transaction Privilege Taxes were not paid on sales of $737,757.14 made to Arizona customers. The only difference between the sales on which taxes were paid and those on which taxes were not paid was that in all cases in which respondent's customers paid to it an amount to cover the Arizona Transaction Privilege Tax in addition to the purchase price, respondent paid the taxes to petitioner. (A.R. 20). Respondent failed to remit the tax in all cases where its customers refused to pay the tax, or an additional amount to cover the tax. (A.R. 20)

On or about December 17, 1956, petitioner, by a deficiency assessment, levied on respondent for the $14,213.29 additional taxes which it claimed were due from the $737,757.14 of sales on which no tax was paid during the audit period. (A.R. 75, 76). Within the proper time, respondent applied for a hearing, protested, paid under protest, and then brought its action in the Maricopa County Superior Court, Phoenix, Arizona, to recover the tax thus paid. (A.R. 76).

## REASONS FOR GRANTING THE WRIT

Petitioner contended in all previous phases of this action and contends here that respondent in selling its products in Arizona and by doing certain other work appurtenant thereto had engaged in sufficient localized activities within this state whereby the State of Arizona could lawfully tax all sales made or work done by respondent within its limits. Respondent claimed that all its sales were sales in interstate commerce, and all the work done was incident to sales in interstate commerce, and therefore the gross receipts from said sales or work were exempt from such taxation by reason of Article 1, Section 8 of the Constitution of the United States. Further, respondent claims it did not engage in sufficient localized activities to remove these sales and work from the claimed exemption.

The sole question herein is whether or not respondent, by the amount of its localized activities carried on in Arizona, placed itself beyond the protection of the "Interstate Commerce Clause", Article 1, Section 8. It is readily seen, from the statement of facts, that respondent's activities are far beyond the itinerant drummer sales situation of *Robbins* v. *Shelby County*, 120 U.S. 489, or the solicitation only activities of the out-of-state seller involved in *McCleod* v. *Dilworth*, supra, wherein this court held that such solicitation activities alone did not remove sales from the protection of the "Interstate Commerce Clause". Here we have not only full time sales and technical assistance available to respondent's

customers from its sales representative but there are numerous other local competitive activities which respondent has made available for its local customers. The first of these is a local office which is known to, used by customers and used as a meeting place by respondent's employees. (A.R. 47, 48). Secondly, there is located in the same building a local stock of repair parts for use in repair and service of respondent's products. (A.R. 14, 51, 52). Additionally, respondent, during the time of the audit, had one man employed as an erector and since that time has two men so employed for local work. (A.R. 59). These men are available not only for erection work, but when needed can apply their high degree of training and skill to customers' repair and service problems. And they do spend a substantial amount on this work. (A.R. 68, 70). Certainly, these activities of supplying local sales and technical assistance, seeing to it that a stock of repair parts is also available locally, and having erection, repair and service personnel available locally, shows that respondent's activities go far beyond the itinerant "drummer's" activities or the activities of a local salesman merely soliciting orders.

Petitioner also strenuously urges that the total picture of respondent's activities which the customer sees is such that there is created in his mind the rightful impression that respondent, locally, can supply all competitive benefits that such a customer will receive when he deals with a local merchant. As said by Justice Udall, in his dissent to the Arizona Supreme Court's majority opinion:

> I believe this reasoning utilizes an unwarranted premise as a basis for judgment; that in fact plaintiff's operations—hereinafter detailed—are as different from the old-style 'drummer's' modus operandi as daylight is from dark.
>
> The proper yardstick to apply is: has plaintiff, as an out-of-state concern, by its overall operations in Arizona so localized its activities as to permit it to compete on an equal basis with local merchants? If it has then its sales are taxable in Arizona, otherwise not. Norton v. Department of Revenue

(cited in majority opinion); Hartman, State Taxation of Interstate Commerce, Dennis & Co. pp. 102, 103, 110. Furthermore, these activities, I believe, should be viewed from the position of the potential customer, i.e., can the buyer expect to receive the same service from plaintiff as he could from a local business selling cotton gins?"

Then Justice Udall examines minutely the solicitation activities, stock of repair parts, availability of erection, service and repair personnel and concludes:

"It may well be that any one of these factors of activities taken separately would not justify Arizona imposing a tax, but it is the overall localized activities which must be considered in determining whether the facts are sufficient to predicate the tax. Norton case, supra. No two of these tax cases are the same and each must be judged upon its own peculiar facts. In my opinion the legal principles enunciated in the Norton case, and the Ensign case (75 Ariz. 220), are controlling here. Perhaps, because of the local outlet feature, the facts are stronger than in the instant case."

"Nevertheless, I verily believe that plaintiff has by its overall activities subjected itself to taxation in Arizona, even though it has very studiously tried to escape it. To rule otherwise is to allow plaintiff a competitive advantage and discriminate by taxation against his local competitor. The tendency of late has been for the U. S. Supreme Court to draw a finer balance between two conflicting philosophies, thereby permitting the States to force operators such as plaintiff to bear their fair share of the tax burden."

While petitioner contends such is the true factual situation involved, it must in all truth and honesty admit that the present factual situation does not present as large a scale of local operation as presented in *Norton Co. v. Department of Revenue*, supra, wherein Norton Co. had a complete retail branch and clerical division operating within the taxing state. Nor does it present the factual situation of *B. F. Goodrich v. State*, 38 Wash. 2d. 663, 231 P. 2d. 325, cert. denied, 342 U.S. 876, decided soon after the Norton decision, and relying upon it for its rule of law, wherein

B. F. Goodrich had local operations consisting of large numbers of sales, clerical and administrative personnel employed within several divisions of B. F. Goodrich Co., almost all of which had local retail outlets. The B. F. Goodrich case had one very important difference, and this was that one of the types of sales taxed, Class A, Automotive, Aviation and Government Sales, concerned a sales division engaged solely in industrial sales. It had no retail outlet in the state. While treating the sales of this division separate from all other sales, still it was held taxable on the grounds that its sales, clerical and administrative office operation locally carried on in Washington, provided a sufficient nexus for the tax.

While there was no retail outlet involved in *Field Enterprises* v. *State*, 352 U.S. 806, affirming per curiam the Washington Supreme Court, in 47 Wash. 2d. 852, 289 P. 2d. 1010, still there was involved therein a large sales organization of hundreds of salesmen, which was held to be a sufficiently large localized activity upon which the court could decide that the impact of the interstate commerce clause had been overcome.

The present case, for which petitioner requests the granting of the writ of certiorari, presents a fact situation which falls between the decisions of this Court in the aforementioned *McCleod* v. *Dilworth*, supra case and the *Norton* and *Field Enterprises* cases. There is not a single federal or state decision which attempts to draw the line between these landmark cases. There is a great uncharted void of tax situations which falls squarely within this problem area. And with taxes always being a matter of prime consideration for every large operation of business, there are more and more of such businesses attempting to and succeeding in changing their mode of operations to fall within this questionable category. The importance of a decision determining rights within this void which will be applicable to all states engaged in sales taxation and which will set a uniform rule for all such states is obvious. That such a determination can only come from this Court goes without saying.

This Court has in recent years followed a continuing trend of attempting to clarify taxing rights under the interstate commerce clause. *Western Livestock* v. *Bureau of Revenue*, 303 U.S. 250; *McGoldrick* v. *Berwind-White Coal Mining Co.*, supra; *International Harvester* v. *Department of Treasury*, 322 U.S. 340; *Norton* v. *Department of Revenue*, supra; *Northwestern States Portland Cement Co.* v. *State of Minnesota*, 358 U.S. 458; *Scripto Inc.* v. *Carson*, 362 U.S. 207. The trend of these cases can be best summed up in the often used words that "interstate commerce must pay its way". Our state courts have been following this trend and as recently as April 11, 1960, the Supreme Court of Michigan in *Armco Steel Corp.* v. *State of Michigan*, .....Mich.....; 102 N.W. 2d 552, allowed a similar state tax against a claim of burden on interstate commerce.

The case which petitioner presents to this court can very properly be considered a situation which should be determined in order to properly continue the trend of the above cited cases. The interstate commerce clause is not an absolute bar to state taxation of interstate sellers. This court, in the above cited cases, has held over and over again that where there are sufficient localized activities engaged in within the taxing state, by the interstate seller, the taxing state has the right to treat the business conducted just like that of a local merchant as far as taxation is concerned. In view of the factual situation involved here, where respondent has acted in Arizona to have available every localized competitive activity necessary to meet local competitors in the competition for sales, petitioner feels it right and proper that a determination should be made that the respondent cannot use the interstate commerce clause to shield itself from state taxation. Since respondent acts in every factual manner just like a local business, it is therefore constitutionally proper that the State of Arizona should be able to tax that operation on an equal basis with the local competition which it has so successfully imitated.

## CONCLUSION

Petitioner's writ of certiorari should be granted because there is presently a great void in our law regarding the right to the protection from state taxation by reason of the interstate commerce clause, where an interstate seller goes beyond mere solicitation activities in the taxing state, but does not go as far as to channel its business through a large local retail outlet or a large sales and administrative division. A determination of this situation is necessary for the interest and protection of the several states and businessmen engaged in local and interstate commerce. A granting of this writ and determination of this question by this Court is the only way this can be accomplished and, therefore, its importance cannot be over-emphasized.

Respectfully submitted,

LESLIE C. HARDY
Special Assistant
Attorney General of
the State of Arizona
159 Capitol Building
Phoenix, Arizona
Counsel for the Petitioner.

ROBERT W. PICKRELL
The Attorney General
of the State of Arizona
159 Capitol Building
Phoenix, Arizona

PHILIP M. HAGGERTY
Assistant Attorney General
of the State of Arizona
159 Capitol Building
Phoenix, Arizona
Of Counsel.

## APPENDIX NO. I

## IN THE SUPREME COURT OF THE STATE OF ARIZONA

| | |
|---|---|
| STATE TAX COMMISSION OF THE STATE OF ARIZONA,<br>Appellant,<br>v.<br>THE MURRAY COMPANY OF TEXAS, INC., a corporation,<br>Appellee. | No. 6853 |

Appeal From Superior Court of Maricopa County
Honorable Charles C. Bernstein, Judge
Judgment Affirmed

Wade Church, Attorney General
Leslie C. Hardy, Chief Asst. Atty. Gen'l
Stanley Z. Goodfarb, Asst. Atty. Gen'l
Attorneys for Appellant

Evans, Kitchel & Jenckes
Jos. S. Jenckes, Jr.,
Morton M. Scult, of Phoenix
Attorneys for Appellee

PHELPS, Justice.

This is an appeal by the State Tax Commission of the State of Arizona from a judgment against it in the sum of $14,213.29 paid by plaintiff-appellee under protest following an additional assessment against it by the Commission in the above amount as and for a transaction privilege tax as provided for under the provisions of A.R.S. § 42-1301, et seq. The parties will hereinafter be designated as plaintiff and the Commission.

The facts are that plaintiff is a Delaware corporation with its principal place of business located at Dallas, Texas, and a branch

office in Fresno, California. It is engaged in the manufacture of cotton gins and prefabricated steel buildings which it sells in many states, including Arizona, as well as in foreign countries. It consigns a stock of gin repair parts to Food Machinery & Chemical Corporation at Phoenix, Arizona. These repair parts are sold by Food Machinery to its customers in Arizona, and it pays to the Commission the transaction privilege tax incident to such sales. Plaintiff exercises no control over the sales of such parts. Food Machinery handles said parts on a commission basis and at intervals remits to plaintiff the wholesale price thereof.

Plaintiff has as its sales representative in Arizona one W. J. Simmons who resides in Phoenix, and reports to the Fresno branch office. He solicits orders for plaintiff's products from persons and firms in Arizona. All sales of cotton gins and steel buildings are made pursuant to orders given to Simmons by customers or sent directly by the customer to plaintiff at Fresno or Dallas office. Simmons transmits orders procured by him to the Fresno office which are forwarded by it to the Dallas office for acceptance. Delivery of the gin machinery and steel buildings to customers are made on cars or trucks at Dallas. Billings are made and payments received either by the Fresno or Dallas office.

The contract between plaintiff and purchaser provides that "Any sales or use tax payable at source, that is or may be made effective and applicable to the goods and machinery embraced in this contract, shall be added to the purchase price." Where the tax has been paid by the customer it has been remitted to the Commission. If the purchaser did not pay such tax none was paid to the Commission.

It further provides that plaintiff will provide an erector (an expert in assembling and installing gins) if desired by the customer. The gin is (necessarily) shipped to the gin site in a knocked down condition and is there assembled. The purchaser agrees to install and operate the gin according to printed instru-

tions furnished by plaintiff. When requested, the assembly, installation and testing is supervised by an erector furnished by plaintiff. The purchaser pays for services of the erector. The cost of assembly and installation is insignificant in comparison to cost of the gin. But they are necessary to the use for which it was intended.

Practically the same provisions are incorporated in the contract for the sale of steel buildings. The purchaser furnishes all labor for its erection except a superintendent and a helper who are furnished by plaintiff. The concrete work, plumbing and electrical work are the sole responsibility of the purchaser. These buildings are (Necessarily) shipped to customers knocked down. They are assembled in a short time at a small cost compared with cost of manufacturing. The assembling of these buildings, like the gins, is necessary to their use for which they were intended. The superintendent and helper do no work except that inherent in the task of assembling them.

During the period here involved Joe E. May, who resides in Arizona, performed the work incident to gin machinery if requested by purchaser to do so. May receives his pay and directions from the Fresno office and makes his reports to that office. He receives his pay check and other mail from Fresno at his home address, May also repairs gins when desired by the gin owner. Occasionally a call for May is placed at Food Machinery office and relayed to May or given to him personally if he comes in. May is furnished an automobile by the company for his use, but he furnishes his own hand tools used in assembling or repairing gins. Some time in 1957 one Richard Milligan was employed in the same capacity as May and now resides in Phoenix. He also works out of the Fresno office.

It is immediately apparent that the facts in this case are quite different from the facts either in the case of Arizona State Tax Commission v. Ensign, 75 Ariz. 220, 254 P.2d 1029, or any of

the other Arizona cases, or Norton Co. v. Department of Rev. 405 Ill. 314, 90 N. E. 2d 737; 340 U. S. 534, 71 S.Ct. 377, 95 L.Ed. 517. The cases upholding collection of a privilege tax are largely based upon the fact of an established business in the State.

It is the contention of counsel for the Commission however that the plaintiff had engaged in sufficient localized activities in this State to bring it within the rule enunciated in the Norton case, supra, and that this State may lawfully impose the privilege and transaction tax upon it under the provisions of A.R.S. § 42-1301, et seq. The stipulated facts are all set out above and the depositions of Messrs. Simmons and Jodis do not materially modify the facts extrinsically stipulated to be correct except that, in addition to being a salesman, Simmons testified he has engineering knowledge acquired through his employment of several years with plaintiff and that he keeps blueprints (of some kind presumably of gins). Also that he keeps a filing cabinet for his correspondence at the office of Foo l Machinery and sometimes, after visiting the gins and looking over the plant, he makes suggestions as to improvements in the installation then in use. This would appear to be a sales suggestion.

We perceive nothing of material benefit to plaintiff performed by Simmons different from what he might have performed as an ordinary salesman visiting the State periodically. We believe it to be indisputable that all sales of gins and steel buildings made pursuant to orders solicited by Simmons or sent by the customer direct to the Fresno office or to the Dallas office, accepted in Dallas, and machinery delivered to the customer on cars or trucks at Dallas, Texas, are interstate transactions.

The fact that it was necessary to ship both gins and houses knocked down and had to be assembled and installed at the site where it was to be used, and required experts to assemble and install them does not in itself convert it into an intrastate transaction. Nor does the fact that the contract of purchase provides that when requested by the purchaser to do so the plaintiff will provide an

expert to supervise the assembly and installation of the gins at purchasers' expense make it intrastate in character; neither does the fact that the expert was an employee of plaintiff and lived in Arizona make it intrastate. Until such machinery is assembled and installed it is incapable of application to the use for which it was manufactured. The work of assembling and installing and the cost thereof is of comparative insignificance to the cost of manufacturing it.

Under the contract of sale and purchase of steel buildings the purchaser is made solely responsible for the concrete work, including foundation, plumbing and electrical work, and furnishes all labor for the erection of the buildings, except a superintendent and one helper who are furnished by plaintiff. Like the gin machinery, the erection of the steel building as to time consumed and costs are minor items when compared with the cost of manufacturing them.

Plaintiff's total sales of gins, steel buildings and repair parts in Arizona from January 1, 1954 to September 30, 1956, amounted to $1,180,621.62. The transaction and privilege tax was paid by plaintiff when the purchaser paid it but it was not paid otherwise. The amount paid under protest represents the amount of tax which the purchaser did not pay.

There is yet another fact to be taken into consideration before the issue here can be determined. Plaintiff consigned to Food Machinery & Chemical Corporation at Phoenix, Arizona, a stock of gin repair parts. Food Machinery as such consignee sells the parts on commission at its retail price and through its Riverside headquarters office pays the sales tax to the Arizona State Tax Commission, and periodically remits to plaintiff the wholesale price therefor. Plaintiff exercised no control over Food Machinery in its handling of its gin repair parts. The title to the repair parts sold by Food Machinery at all times remained in plaintiff until sold by Food Machinery.

We believe it to be the general law that a consignee of goods sold on consignment is the agent of the consignor, however, unless otherwise agreed, it is a limited agency only for the purpose of selling the merchandise furnished it on consignment, which is generally held to be insufficient to constitute doing business in the state by the consignor. Reed v. Real Detective Pub. Co., 63 Ariz. 294, 162 P.2d 133; Yarbrough v. W. A. Gage & Co., 334 Mo. 1145, 70 S.W. 2d 1055; Falls Rubber Co. v. La Fon, Tex. Com. App., 256 S.W. 577; Southwest General Electric Co. v. Nunn Electric Co., Tex. Com. App., 283 S.W. 781.

This fact therefore when taken into consideration with the other facts above-related we believe is insufficient to constitute a localization of its activities in the State of Arizona to the degree that we can say its sale of gins and steel buildings in the manner stated in the stipulation of fact, had the effect of transmuting what would otherwise be purely an interstate transaction into an intrastate transaction and subject it to the imposition of the privilege sales tax under the provisions of A.R.S. § 42-1301, et seq

As we said in the outset this case possesses but little similarity to the Norton case, supra, and none whatsoever to the Ensign case, supra. The Norton case was actually operating a branch retail business in the State of Illinois by state permission and had thereby submitted itself to the taxing power of the state. The court said under such circumstances the burden devolved upon it to show that particular transactions were dissociated with the local business. This it had not done. Counsel using this as a premise undertakes to say that the burden is upon the Murray Company to make a like showing as to its sales of gins and steel buildings through Simmons or upon orders direct from their customers. If it were first shown that Murray Company had submitted itself to the taxing powers of this State and likewise to its judicial processes then the burden would fall upon the taxpayer claiming immunity from such tax. Until it does the law imposes no such burden upon it. The court also said that by localizing its business in Illinois the

Norton Company had gained the advantages of a retail outlet in the state to keep close to the trade, to supply locally many items and take orders for others and to reduce freight costs to local consumers. The court then states:

> "* * * Although the concern does not, by engaging in business within the State, lose its right to do interstate business with tax immunity, [citing case] it cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business." [340 U.S. 534, 71 S.Ct. 381.]

The court then held that orders sent directly to Worcester by the customer and shipped directly to the customer from Worcester were interstate in character.

It does not seem to be logical to say that the Murray Company occupies a similar position in Arizona to that occupied by the Norton Company in Illinois. In that state Norton Company had submitted itself not only to the excise tax law of that state by establishing a business there, but also to the civil process of the courts of that state to redress any wrong a customer may have suffered. Murray Company certainly has not subjected itself either to the excise tax or to the legal processes of state courts in Arizona. We said in Reed v. Real Detective Pub. Co., supra, in which the Detective Publishing Company was shipping and selling their publication to the Arizona dealer on consignment, over whom it exercised no control as in the instant case, that the publishing company was engaged in interstate commerce. True, this was before the Norton case but the latter case has in no sense modified it.

Considering all of the factual circumstances to which the parties have stipulated, they do not, in our opinion, put the plaintiff here in business in Arizona in any degree. They therefore are not subjected to the payment of our privilege sales tax.

This conclusion in nowise conflicts with the Ensign case, supra. Ensign and associates were engaged in business in Arizona, sell-

ing, servicing and installing deep well Turbine pumps in Arizona. They had a dealer's agreement with Layne and Bowler of Los Angeles, a California corporation, whereby they were to handle only the Layne and Bowler pumps. Four-fifths of Ensign's business were sales made to Arizona users. This included installation. On these sales excise tax was paid. In that case Phelps Dodge Company at Bisbee, Arizona, ordered a pump from Ensign who forwarded the order to Layne and Bowler in Los Angeles for acceptance. They shipped the pump direct to Phelps Dodge Company, f.o.b. Los Angeles. Phelps Dodge Company paid Ensign for the pump on the terms he prescribed. Ensign later remitted to Layne and Bowler their sale price therefor. We held the taxing incident was engaging in business in Arizona and that the state could collect a tax on its gross proceeds of sale or gross income resulting from its business activities within the state. Ensign was doing business in the state and therefore was required to pay the excise tax provided by law for the privilege of engaging in business in the state measured by the gross income or gross proceeds of sales made by him. The Murray Company was not engaged in business in this state. We do not believe the case of B. F. Goodrich Co. v State, 38 Wash. 2d 663, 231 P.2d 325, changes the rule laid down in the Norton Company case, supra. The court in the Goodrich case quotes with approval the pronouncement in the Norton Company case to the effect that even where a foreign corporation engages in business in another state it does not lose its right to do interstate business with tax immunity. The court used the Norton Company case as its yardstick in determining both--what transactions were not taxable and those that were.

We have held more than once that findings of fact are unnecessary where the parties litigant have stipulated to the facts. Work v. United Globe Mine, 1[illegible] Ariz. 339, 160 P. 813; Gilliland v. Rodriquez, 77 Ariz. 163, 268 P.2d 334.

In view of the conclusion we have reached however the trial court's findings of fact and conclusions of law become immaterial.

Judgment affirmed.

M. T. PHELPS
Justice

CONCURRING:
FRED C. STRUCKMEYER, JR.
Chief Justice
J. MERCER JOHNSON
Justice
LAURENS L. HENDERSON
Judge of Superior Court

Note: Justice Charles C. Bernstein, being disqualified, the Honorable Laurens L. Henderson, Judge of Superior Court, Maricopa County, was called to sit in his stead and participate in the determination of this appeal.

UDALL, Justice (dissenting)

This case was tried in lower court upon an agreed statement of facts, hence there is no conflict of evidence to be resolved. Under such circumstances it is well settled that this Court is in nowise bound by the conclusions of law drawn by the trial court. I have a deep and abiding conviction that my brethren of the majority, in affirming the judgment of the lower court, are departing from sound principles of tax law to the serious detriment of all other taxpayers in the State.

In my opinion the Court is improperly throwing a mantle of local tax immunity over plaintiff's manifold operations in this State which is not deserved. The case is really being decided upon the basis that plaintiff's sales and the doing of certain work incident thereto, are in the same class—for taxation purposes—as the sales made by an itinerant drummer who solicits orders in a State which are sent directly to the out-of-state home office for acceptance and filling or delivery back to the buyer. Concededly as to such sales, the State of the buyer has no local grip on the seller. McLeod v. J. E. Dilworth Co., 322 U.S. 327, 64 S.Ct. 1023, 88 L.Ed. 1304.

I believe this reasoning utilizes an unwarranted premise as a basis . judgment; that in fact plaintiff's operations—hereinafter detailed—are as different from the old-style "drummer's" modus operandi as daylight is from dark.

The proper yardstick to apply is: has plaintiff, as an out-of-state concern, by its overall operations in Arizona so localized its activities as to permit it to compete on an equal basis with local merchants? If it has then its sales are taxable in Arizona, otherwise not. Norton v. Department of Revenue (cited in majority opinion); Hartman, State Taxation of Interstate Commerce, Dennis & Co. pp. 102, 103, 110. Furthermore, these activities, I believe, should be viewed from the position of the potential customer, i.e., can the buyer expect to receive the same service from plaintiff as he could from a local business selling cotton gins?

Let us examine plaintiff's localized activities as shown by the record. Generally these may be grouped into solicitation, stock of repair parts, availability of erection service, and repair personnel. More specifically I point out

1. Plaintiff has residing here a full time sales representative who is on salary and commission, and this man took part in nearly every sale made in the area.

2. Plaintiff maintains in this state a stock of repair parts for its gins. These parts are on consignment to Food Machinery and Chemical Corporation, who handle the sales, but they are the property of plaintiff.

3. For the right to handle these parts on consignment, Food Machinery provides plaintiff's sales representative with desk space, use of telephone, and a telephone listing. Plaintiff and its employees make full use of these facilities, meeting customers there, meeting there themselves and using it as a base of operations.

4. The sales representative had available locally at this office the

record, plans, and other material necessary for such technical and sales assistance as needed by its customers.

5. Plaintiff has resident here two highly trained and skilled "erectors" who—where called for by contract—erect, service, and repair the cotton gins sold.

It may well be that any one of these factors or activities taken separately would not justify Arizona imposing a tax, but it is the overall localized activities which must be considered in determining whether the facts are sufficient to predicate the tax. Norton case, supra. No two of these tax cases are the same and each must be judged upon its own peculiar facts. In my opinion the legal principles enunciated in the Norton case, and the Ensign case 75 Ariz. 220, 254 P 2d 1029, are controlling here. Perhaps, because of the local outlet feature, the facts are stronger than in the instant case.

Nevertheless, I verily believe that plaintiff has by its overall activities subjected itself to taxation in Arizona, even though it has very studiously tried to escape it. To rule otherwise is to allow plaintiff a competitive advantage and discriminate by taxation against his local competitor. The tendency of late has been for the U. S. Supreme Court to draw a finer balance between two conflicting philosophies, thereby permitting the States to force operators such as plaintiff to bear their fair share of the tax burden.

Finally, it should be noted that plaintiff's total sales covered by the audit period of 2 years and 9 months amounted to $1,180,621.62. A tax of $8,857.29 was voluntarily paid on sales amounting to $442,864.48. Pray, tell where is the difference between the localized sales on which the tax was paid, and the sales involved in this suit amounting to $737,757.14 upon which the State levied and collected a tax of $14,755.15? Factually it would appear that all the sales were either intrastate sales to begin with or, as I believe, the *localized activities* of plaintiff have removed them from the sacrosanct status of interstate sales. Certainly there is not an iota of proof which shows the sales in question here to be

one whit different from those upon which the tax was paid. It is inconceivable that the tax is valid if it can be passed on to the purchaser but otherwise is invalid. This commingling strongly indicates tax liability.

In such an anomalous situation it becomes all the more important that the "overall activities" be most carefully scrutinized. B. F. Goodrich v. State, 1951, 38 Wash. 2d 663, 231 P.2d 325, 330, 331, certiorari denied 342 U.S. 876, 72 S.Ct. 167, 96 L.Ed. 659.

For all of the foregoing reasons I would sustain the tax levied by the Tax Commission and reverse the judgment of the lower court granting plaintiff tax immunity.

LEVI S. UDALL
Justice

## APPENDIX NO. II

# Supreme Court

STATE OF ARIZONA

PHOENIX

CHIEF JUSTICE
FRED C. STRUCKMEYER, JR.
JUSTICES
M. T. PHELPS
LEWIS UDALL
J. MERCER JOHNSON
CHARLES C. BERNSTEIN

SYLVIA HAWKINSON
CLERK
LUCILE BROOKS
DEPUTY CLERK

April 21, 1960

Mr. Wade Church
Attorney General
Capitol Building
Phoenix, Arizona

Re: No. 6853

STATE TAX COMMISSION OF THE STATE OF ARIZONA, Appellant,

v.

THE MURRAY COMPANY OF TEXAS INC., a corporation, Appellee

Dear Sir:

The following action was taken by the Supreme Court on April 19, 1960, in the above-entitled cause:

"ORDER: Appellant's Motion for Rehearing DENIED, Justice Udall dissenting."

Yours truly,
SYLVIA HAWKINSON, Clerk
By L. Brooks,
Deputy Clerk

B

cc:
Messrs. Evans, Kitchel & Jenckes
Attorneys at Law
363 North First Avenue
Phoenix, Arizona

## APPENDIX NO. III

Respondent's Complaint, paragraph V, and also paragraph 3 of Exhibit "A" attached to said complaint which is the protest filed with the State Tax Commission of Arizona upon the payment of said taxes under protest.

*Respondent's Complaint, paragraph V:*

"For the reasons set forth in Exhibit 'A' defendant has collected illegally from the plaintiff the sum of $14,213.29."

*Exhibit "A", attached to Complaint, paragraph 3*

"3. The purported assessment of additional taxes against said company in the amount of $14,213.29 is illegal, void and of no effect for the reasons as follows:

* * * *

(b) The aforesaid gross sales of company by which the Commission has attempted to measure the 2% retail tax resulted from sales made in interstate commerce which, under the provisions of the Constitution of the United States cannot be taxed by the State of Arizona.

(c) The Transaction Privilege Tax (Excise Revenue Act of 1935, as amended) by virtue of the express provisions of subdivision A-4 of Section 42-1321, A.R.S., does not apply to sales in interstate or foreign commerce when prohibited from being so taxed by the Constitution of the United States or the Constitution of this State.

* * * *

(f) The imposition of said additional assessment upon the company constitutes a burden upon interstate commerce contrary to and in violation of the provisions of the Constitution of the United States."

## APPENDIX NO. IV

Conclusion of Law No. 8 of the Judgment of the Maricopa County Superior Court entered December 23, 1958:

> "8. The assessment by defendant of additional taxes upon plaintiff in the amount of $14,213.29 constitutes a burden upon interstate commerce contrary to and in violation of the provisions of the Constitution of the United States, is contrary to the express provisions of subdivision A.4 of Section 42-1321, A.R.S., is illegal and void."

## APPENDIX NO. V

### IN THE SUPREME COURT OF THE STATE OF ARIZONA

STATE TAX COMMISSION OF THE STATE OF ARIZONA,
Appellant,
v.
THE MURRAY COMPANY OF TEXAS, INC., a corporation,
Appellee.

No. 6853

On Remand from the Supreme Court of the United States
Decision on Remand

Wade Church, the Attorney General
Leslie C. Hardy, Asst. Atty. Gen'l &
Stanley Z. Goodfarb, Asst. Atty. Gen'l
Phoenix
Attorneys for Appellant
Evans, Kitchel & Jenckes, Phoenix
Attorneys for Appellee

PER CURIAM:

The cause was presented to this Court by the State Tax Commission of Arizona on the theory that the Murray Company of Texas in selling its products and in doing certain work had engaged in sufficient localized activities within this State so that a tax could be lawfully imposed on all sales in the State of Arizona. We held in our decision of March 30, 1960, (87 Ariz. 268, 273):

> "This fact (consignment of gin repair parts) therefore when taken into consideration with the other facts above-related we believe is insufficient to constitute a localization of its activities in the State of Arizona to the degree that we can say its sale of gins and steel buildings in the manner stated in the

stipulation of fact, had the effect of transmuting what would otherwise be purely an interstate transaction into an intrastate transaction and subject it to the imposition of the privilege sales tax under the provisions of A.R.S. § 42-1301, et seq."

No question was raised as to the sufficiency of the Arizona Transaction Privilege Taxes Act to reach the sales if made within Arizona. Any statements in the decision that the circumstances of the case did not put plaintiff in business in Arizona in any degree were to characterize plaintiff's sales of gins and buildings as interstate rather than intrastate activities, and hence, not amenable to the Arizona enactment.

We restate our conclusions. (1) Plaintiff's sales of gins and steel buildings were interstate and not intrastate transactions; (2) Plaintiff's other business activities did not convert such sales into intrastate transactions; and (3) As interstate transactions the questioned sales are protected by the interstate commerce clause of the Federal Constitution.

FRED C. STRUCKMEYER, JR.
Chief Justice

M. T. PHELPS
Justice

LAURENS L. HENDERSON
Superior Court Judge

Note: The Honorable Jesse A. Udall and Renz L. Jennings, having been seated on this Court since the publication of the opinion, took no part in the decision.

Further note: Justice Charles C. Bernstein, being disqualified, the Honorable Laurens L. Henderson, Judge of the Superior Court, Maricopa County, was called to sit in his stead and participate in the determination of this decision.

# the Supreme Court of the United States

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

# TABLE OF CONTENTS


| | Page |
|---|---|
| Question Presented For Review | 1 |
| Statement of the Case | 2 |
| Argument | 2 |
| Conclusion | 11 |
| Appendix | |
| Stipulation | A-1 |
| Findings of Fact | A-7 |
| Conclusions of Law | A-9 |


# CITATIONS

CASES:


| | |
|---|---|
| Arizona State Tax Commission v. Ensign, 75 Ariz. 220, 254 P. 2d 1029 (1953) | 8 |
| Commonwealth v. Eastman Kodak Co., 385 Pa. 607, 124 A. 2d 100; Cert. den. 352 U. S. 952, 1 L. Ed. 2d 243, 77 S. Ct. 326 | 12 |
| Creamery Package Mfg. Co. v. State Board of Equalization, 62 Wyo. 265, 166 P. 2d 952 (1946) | 6 |
| Field Enterprises v. State, 352 U. S. 806 (1956) | 3 |
| Gross Income Tax Div. v. Surface Combustion Corp., 232 Ind. 100, 111 N. E. 2d 50 (1953) | 6 |
| McLeod v. J. E. Dilworth Co., 322 U. S. 327 (1944) | 3 |
| Northwestern States Portland Cement Co. v. State of Minnesota, 358 U. S. 458 (1959) | 6, 7, 9 |
| Norton Co. v. Dept. of Revenue, 340 U. S. 534 (1951) | 3, 6, 11, 12 |

## CITATIONS—Continued


Riley Stoker Corp. v. State Tax Com'n.,
3 Utah 2d 164, 280 P. 2d 967 (1955) ..... 6

Robbins v. Shelby County,
120 U. S. 489 (1887) ..... 3

Scripto v. Carson,
362 U. S. 207 (1960) ..... 6, 7, 10, 11

State Tax Com'n. v. Murray Co. of Texas, Inc.,
87 Ariz. 268, 350 P. 2d 674 (1960) ..... 2

United Piece Dye Works v. Joseph, 282 App. Div. 60, 121 N. Y. S. 2d 683; Aff'd. 307 N. Y. 780, 121 N. E. 2d 617; remittitur amd. 307 N. Y. 836, 122 N. E. 2d 329; Cert. den. 348 U. S. 916, 99 L. Ed. 718, 75 S. Ct. 298 ..... 12

Weber Showcase & Fixture Co. v. Co-Ed Shop,
47 Ariz. 415, 56 P. 2d 967 (1936) ..... 6

York Mfg. Co. v. Colley,
247 U. S. 21 (1918) ..... 6

STATUTES:

Arizona Revised Statutes,

Section 42-1308 ..... 7

Section 42-1309 ..... 7

Section 42-1312 ..... 8

Section 42-1401, et seq ..... 10

Section 42-1408 ..... 10

Section 42-1409 ..... 10

Section 42-1410 ..... 10

Section 42-1411 ..... 10

Section 42-1412 ..... 10

# In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 937

STATE TAX COMMISSION OF THE STATE OF ARIZONA, PETITIONER,

*vs.*

THE MURRAY COMPANY OF TEXAS, INC., A CORPORATION, RESPONDENT.

---

## BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

---

Comes now the Respondent, The Murray Company of Texas, Inc., and presents this brief in opposition to the Petition For Writ of Certiorari filed herein by the Petitioner, State Tax Commission of the State of Arizona.

### QUESTION PRESENTED FOR REVIEW

Petitioner's statement of the "Question Presented for Review" sets forth a purely academic question. This Court will be concerned only with the particular fact situation presented by the record herein. For that reason we believe that the "question presented for review" can be more precisely stated as follows:

May the State of Arizona exact from Respondent a tax upon the privilege of engaging in the business of

selling tangible personal property at retail which is measured by unapportioned gross receipts derived from sales exclusively in interstate commerce, consummated outside the State of Arizona, where the only activity of Respondent within the State incident to sales of its cotton gins and steel buildings is the solicitation thereof by a single representative residing in the State and assistance rendered in the assembling of gins and buildings which are delivered in a "knocked down" condition.

## STATEMENT OF THE CASE

The Statement of the Case presented by Petitioner is misleading, particularly in that it attempts to confuse the activities of Food Machinery and Chemical Corporation with the activities of Respondent. The facts involved in this action are set forth in the Stipulation entered into between the parties (Appendix A-1) and the Findings of Fact entered by the trial court (Appendix A-6). Since both the Stipulation and the Findings of Fact are brief, rather than lengthen this presentation with a restatement of their contents, we respectfully urge the Court to review them. It will be noted that the Arizona Supreme Court did not question the Findings of the trial court. A summary of the facts will be found in the Arizona Court's opinion. *State Tax Commission v. Murray Company of Texas, Inc.*, 87 Ariz. 268, 350 P. 2d 674 (1960).

## ARGUMENT

Petitioner does not contend that the decision of the Supreme Court of Arizona herein conflicts with any

decision of this Court. It is conceded that the opinion of the Arizona Court is not inconsistent with *Robbins v. Shelby County*, 120 U. S. 489 (1887); *McLeod v. J. E. Dilworth Co.*, 322 U. S. 327 (1944); *Norton Company v. Department of Revenue*, 340 U. S. 534 (1951); and *Field Enterprises v. State*, 352 U. S. 806 (1956). We submit that *Norton* fully and completely supports the decision of the Arizona court and precludes a contrary determination. This is clearly demonstrated by a comparison of the statements of this Court in *Norton* with the record herein:

*Norton:* "But when, as here, the corporation has gone into the state to do local business by state permission and has submitted itself to the taxing power of the state, it can avoid taxation on some Illinois sales only by showing that particular transactions are disassociated from the local business and interstate in nature. * * * This corporation has so mingled taxable business with that which it contends is not taxable that it requires administrative and judicial judgment to separate the two. We conclude that, in the light of all the evidence, the judgment attributing to the Chicago branch income from all sales that utilized it either in receiving the orders or distributing the goods was within the realm of permissible judgment. Petitioner has not established that such services as were rendered by the Chicago office were not decisive factors in establishing and holding this market. On this record no other source of the customary relationship is shown."

*Record:* "During the period involved herein plaintiff did not, in the state of Arizona: (a) maintain a local retail establishment; (b) sell to customers in the state of Arizona items maintained in stock by plaintiff in the state of Arizona; (c) maintain an office which was rendering services to local custom-

ers which were factors in establishing and holding its Arizona market;" (Appendix, A-8)

*Norton:* "This corporation could have approached the Illinois market through solicitors only and it would have been entitled to the immunity of interstate commerce as set out in the Dilworth case."

*Record:* "During the period involved herein plaintiff approached the Arizona market through solicitors only." (Appendix A-8)

*Norton:* "Petitioner elected to localize itself in the Illinois market with the advantages of a retail outlet in the State, to keep close to the trade, to supply locally many items and take orders for others, and to reduce freight costs to local consumers. Although the concern does not, by engaging in business within the state, lose its right to do interstate business with tax immunity, Cooney vs. Mountain States Tel. & Tel. Co., 294 U. S. 384, 79 L. Ed. 934, 55 S. Ct. 477, it cannot channel business through a local outlet to gain the advantage of a local business and also hold the immunities of an interstate business."

*Record:* "During the period involved herein, plaintiff did not, in the state of Arizona: * * * (d) elect to localize itself in the Arizona market with the advantages of a retail outlet in the state; (e) channel business through a local outlet to gain the advantage of a local business. 7. Plaintiff's transactions described in the aforesaid stipulation were interstate in nature and not associated with any local business being conducted by plaintiff in the state of Arizona." (Appendix A-8)

Petitioner treats as Respondent's the activities of Food Machinery & Chemica. Corporation in holding

on consignment and selling repair parts manufactured by Respondent. The legal significance of Food Machinery's activities was determined, as a matter of state law, by the Arizona Court, as follows:

> "We believe it to be the general law that a consignee of goods sold on consignment is the agent of the consignor, however, unless otherwise agreed, it is a limited agency only for the purpose of selling the merchandise furnished it on consignment, which is generally held to be insufficient to constitute doing business in the state by the consignor." (350 P. 2d 677)

By this clearcut ruling it is established that the separate and independent activities of Food Machinery in the sale of repair parts are not the activities of Respondent and that such activities do not bring Respondent within the jurisdiction of the State of Arizona for any purpose.

With respect to Respondent's activities in the assembling of cotton gins and steel buildings, the Arizona Court stated:

> "The fact that it was necessary to ship both gins and houses knocked down and had to be assembled and installed at the site where it was to be used, and required experts to assemble and install them does not in itself convert it into an intrastate transaction. Nor does the fact that the contract of purchase provides that when requested by the purchaser to do so the plaintiff will provide an expert to supervise the assembly and installation of the gins at purchaser's expense make it intrastate in character; neither does the fact that the expert was an employee of plaintiff and lived in Arizona make it intrastate. Until such machinery is assembled and installed it

is incapable of application to the use for which it was manufactured. The work of assembling and installing and the cost thereof is of comparative insignificance to the cost of manufacturing it." (350 P. 2d 677)

The foregoing portion of the Arizona Court's opinion is undoubtedly predicated upon *Weber Showcase & Fixture Co. v. Co-Ed Shop*, 47 Ariz. 415, 56 P. 2d 667 (1936) wherein the Arizona Court followed and applied the rule laid down by this Court in *York Manufacturing Co. v. Colley*, 247 U. S. 21 (1918). The conclusive effect of the *York* decision in questions involving the taxing power of the states is recognized in *Gross Income Tax Division v. Surface Combustion Corp.*, 232 Ind. 100, 111 N. E. 2d 50 (1953) Cert. denied 346 U. S. 829; *Riley Stoker Corp. v. State Tax Commission*, 3 Utah 2d 164, 280 P. 2d 967 (1955); *Creamery Package Mfg. Co. v. State Board of Equalization*, 62 Wyo. 265, 166 P. 2d 952 (1946).

Petitioner states that this Court "has in recent years followed a continuing trend attempting to clarify taxing rights under the interstate commerce clause", and cites, among others, the recent cases of *Northwestern States Portland Cement Co. v. State of Minnesota*, 358 U. S. 458 (1959) and *Scripto v. Carson*, 362 U. S. 207 (1960). Petitioner contends, in effect, that this "trend" compels a decision in its favor. We submit that the correct disposition of the Petition For Writ of Certiorari herein does not depend on the continuation of any such "trend" and that the principles established in *Norton* are decisive. The vitality of *Norton* has not been diminished by subsequent de-

cisions of this Court such as *Portland Cement* and *Scripto*.

Transaction privilege taxes are imposed by the laws of Arizona as follows:

A.R.S., §42-1308.

"A. Every person who receives gross proceeds of sales or gross income upon which a privilege tax is imposed by this article, desiring to engage or continue in business, shall make application to the commission for a privilege license accompanied by a fee of one dollar. Such a person shall not engage or continue in business until he has obtained a privilege license. Licensees operating on March 24, 1954, shall be deemed to have complied with the provisions of this section.

* * * * * * *

F. A person who violates any provision of this section is guilty of a misdemeanor punishable by a fine for each offense of not less than ten dollars, or by imprisonment for not less than ten days. As amended Laws 1956, Ch. 98, § 1."

A.R.S., §42-1309.

"A. There is levied and there shall be collected by the commission for the purpose of raising public money to be used in liquidating the outstanding obligations of the state and county governments, to aid in defraying the necessary and ordinary expenses of the state and the counties, to reduce or eliminate the annual tax levy on property for state and county purposes, and to reduce the levy on property for public school education, annual privilege taxes measured by the amount or volume of business transacted by persons on account of their business activities,

and in the amounts to be determined by the application of rates against values; gross proceeds of sales, or gross income, as the case may be, in accordance with the schedule as set forth in §§42-1310 through 42-1315."

A.R.S. §42-1312.

"A. The tax imposed by subsection A of §42-1309 shall be levied and collected at an amount equal to two per cent of the gross proceeds of sales or gross income from the business upon every person engaging or continuing within this state in the business of selling any tangible personal property whatever at retail. * * * ".

The Court will bear in mind that we are not here concerned with a sales tax, a use tax, or a tax upon the privilege of engaging in the business of soliciting orders, assembling machinery, or any activity other than engaging in the business of selling tangible personal property at retail. In *Arizona State Tax Commission v. Ensign*, 75 Ariz. 220, 254 P. 2d 1029 (1953) the Supreme Court of Arizona said:

"The tax imposed by the act is not a sales tax as such but is a tax upon the *privilege of engaging in business* measured by the amount or value of business done."

There are no provisions in the law which permit apportionment of the tax where sales activities are carried on within and without the state of Arizona.

In this action it is not suggested that Respondent's activities in the State of Arizona are other than exclusively in interstate commerce. It must therefore

be the position of Petitioner that Respondent can be subjected to an unapportioned tax on gross receipts as a condition to exercising the privilege of conducting exclusively interstate activities within the state of Arizona. This is not the law as established by this Court. *Portland Cement* involved a State income tax levied upon that portion of the foreign corporation's net income earned from and fairly apportioned to business activities in the State which were exclusively in furtherance of interstate commerce. This Court, in upholding the validity of the tax, stated:

> "Moreover, it is beyond dispute that a state may not lay a tax on the 'privilege' of engaging in interstate commerce, Specter Motor Service Inc. v. O'Connor, 340 U. S. 602, 95 L. Ed. 573, 71 S. Ct. 508 (1951). * * *
>
> The levies are not privilege taxes based on the right to carry on business in the taxing state. The states are left to collect only through ordinary means. The tax, therefore, is "not open to the objection that it compels the company to pay for the privilege of engaging in interstate commerce." * * *
>
> This is not an unapportioned tax which by its very nature makes interstate commerce bear more than its fair share." (358 U. S. 458, 462)

Even if the incidence of the tax involved in this action—the privilege of engaging in business—were ignored, and even if measuring the tax by sales to Arizona customers were somehow deemed to be an acceptable "apportionment", the instant case would be clearly distinguishable from *Portland Cement*. The activities within the state, which in *Portland Cement* were

deemed to "form a sufficient 'nexus between such a tax and transactions within a state for which the tax is an exaction'," are lacking in the instant case.

*Scripto* is of no comfort to Petitioner. It involved a Florida use tax. Arizona also has a use tax which is complimentary to the transaction privilege tax with which we are here concerned. *A.R.S.*, §42-1401, et seq. The tax—2% of the purchase price—is imposed upon the use or consumption in the state of tangible personal property purchased from a retailer where the proceeds of the sale are not subject to the transaction privilege tax. Persons storing, using or consuming such property are liable for the tax. The retailer is required to collect the tax from the purchaser and remit the same to the State Tax Commission. *A.R.S.*, §§42-1408, 42-1410, 42-1411 and 42-1412. On the basis of *Scripto*, Petitioner could insist upon Respondent's collecting from its Arizona customers the use tax applicable to cotton gins purchased by them and remitting the same to Petitioner, were it not for the fact (totally unrelated to the *power* to tax) that cotton gins happen to fall within an exemption contained in *A.R.S.*, §42-1409, which reads in part as follows:

> "The tax levied by this article does not apply to the storage, use or consumption in this state of the following described tangible personal property: * * *
>
> 8. Tangible personal property in the quantities and of the specifications, including date of delivery, required by the purchaser, which, at the time of purchase, was not available for purchase from an established place of business within this state which was engaged in the sale, from stocks within the state, of

property of the same general specifications in the regular course of business."

The significance of the Arizona use tax, in relation to this case and *Scripto,* is this: If it desired to exercise its power to do so, the State of Arizona could collect taxes from Respondent measured by the amount of its sales to Arizona customers merely by eliminating the exemption above quoted. There is no valid reason for this Court to allow the State of Arizona to reach the same result by discarding established constitutional principles.

## CONCLUSION

In this action the trial court found as a matter of fact that Respondent's activities in the State of Arizona were interstate in nature and not associated with any local business being conducted by it in the State of Arizona; that Respondent did not elect to localize itself in the Arizona market with the advantages of a retail outlet in the State or channel business through a local outlet to gain the advantage of a local business. The Supreme Court of the State of Arizona did not question the Findings of the trial Court. To the contrary, the Supreme Court of Arizona reiterated and confirmed the Findings of the trial Court. In *Norton Company v. Department of Revenue, supra,* this Court stated:

"Of course, in constitutional cases, we have power to examine the whole record to arrive at an independent judgment as to whether constitutional rights have been invaded, but that does not mean that we

will re-examine, as a court of first instance, findings of fact supported by substantial evidence."

We respectfully submit that the findings of the trial court were supported by substantial evidence, the stipulation of the parties and the depositions of two witnesses.

By its Rule 19, this Court has indicated the character of reasons which will be considered in acting upon a Petition For Writ of Certiorari, including:

> "Where a state court has decided a federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

We submit that the federal question involved herein was determined by the Supreme Court of the State of Arizona in accordance with applicable decisions of this Court—certainly, in accordance with *Norton Company vs. Department of Revenue*, *supra*.

For whatever it may be worth, we note that the factual situation presented herein offers less reason to grant certiorari than was offered in *United Piece Dye Works v. Joseph*, 282 App. Div. 60, 121 N. Y. S. 2d 685, aff'd. 307 N. Y. 780, 121 N. E. 2d 617; remittitur amd. 307 N. Y. 836, 122 N. E. 2d 329; Cert. den. 348 U. S. 916, 99 L. Ed. 718, 75 S. Ct. 298, and in *Commonwealth v. Eastman Kodak Co.*, 385 Pa. 607, 124 A. 2d 100; Cert. den. 352 U. S. 952, 1 L. Ed. 2d 243, 77 S. Ct. 326.

We respectfully request that the Petition for Writ of Certiorari be denied.

Respectfully submitted.

DENISON KITCHEL
363 North First Avenue
Phoenix 3, Arizona
*Counsel for the Respondent*

EVANS, KITCHEL & JENCKES
Jos. S. Jenckes, Jr.
363 North First Avenue
Phoenix 3, Arizona
*Of Counsel*

## APPENDIX

STIPULATION

IT IS HEREBY STIPULATED by and between plaintiff and defendant that the Court shall determine this action upon the facts hereinafter set forth in this Stipulation and upon the testimony of W. J. Simmons and J. F. Jodis contained in their respective depositions which are on file herein. Should there appear to be any inconsistency between the facts stated herein and the facts set forth in the aforesaid depositions, the depositions shall govern.

1. Plaintiff is a Delaware corporation engaged in the manufacture and sale of cotton gin machinery and steel buildings. Its products are sold in the United States and many foreign countries. Plaintiff and its products are well known to the cotton ginning industry and to a large degree orders for its products are prompted by its established reputation. From the standpoint of dollar volume it is the largest manufacturer of cotton gin machinery in the world. Substantially all manufacturing activities of plaintiff are carried on in the State of Texas; none are carried on in the State of Arizona. Its home office is maintained in Dallas and a branch office, among others, is maintained in Fresno, California.

2. Plaintiff consigns a stock of gin repair parts to Food Machinery and Chemical Corporation, Phoenix, Arizona. Such parts are sold by Food Machinery to its customers in Arizona and it pays to the State Tax Commission the transaction privilege taxes incident to such sales. Plaintiff, its employees and agents, have nothing whatsoever to do with such sales of repair parts. At regular intervals Food Machinery remits to plaintiff the wholesale price of repair parts theretofore sold by it.

3. A sales representative (W. J. Simmons) employed by, and reporting to the Fresno branch of plaintiff, solicits orders for plaintiff's products from persons and firms situated in the State of Arizona. All sales of cotton gins and steel buildings

are made pursuant to orders which are given by customers to said sales representative or sent directly by the customer to plaintiff's Fresno or Dallas office. Orders delivered to the sales representative are transmitted by him to the Fresno office and then forwarded to the home office at Dallas. Acceptance of all orders takes place at Dallas, Texas. Delivery of gin machinery is made to the customer on cars or trucks at Dallas, Texas. All billings are made and payments received by the Fresno or Dallas office of plaintiff.

4. Copy of a representative contract covering the sale of a cotton gin from plaintiff to a customer in Arizona is attached hereto, marked Exhibit "A" and by reference made a part hereof. Under the terms of the contract plaintiff will provide a machinery erector if desired by the customer. The gin machinery is shipped to the gin site in a knocked down condition and is there assembled and installed. According to the provisions of the contract the purchaser agrees to install and operate the machinery according to the printed directions furnished by plaintiff. When the services of the machinery erector are requested by the customer the erector supervises the assembly, installation and testing of the gin machinery. The cost of assembling and installing the gin machinery is minor in comparison with the cost of manufacturing the same. The assembly and installation of the gin machinery does not involve construction work and is done within a relatively short period of time. The assembly and installation is necessary in order to put the machinery into condition for the use for which it was destined. The erector supplied by plaintiff does not perform work over and above that required by the inherent nature of the gin machinery which is the subject of the sale. The products sold by the plaintiff are such as are used in the cotton ginning trade generally and might be sold to any customer in the regular course of business. They are capable of being dismantled and moved to and reinstalled at other sites.

5. Copy of a representative sales contract for a steel building is attached hereto, marked Exhibit "B", and by reference made a part hereof. The purchaser furnishes all labor for the erection of the buildings except a superintendent and one

helper furnished by plaintiff. Concrete work, plumbing and electrical work are the sole responsibility of the purchaser. The steel buildings are shipped to the purchaser in a knocked down condition and are assembled at the building site upon the foundation provided by purchaser. The cost of assembling the buildings is minor in comparison to the costs of manufacturing the same. The buildings are assembled within a relatively short period of time. The assembling of the steel buildings is necessary in order to put them into condition for the use for which they were destined. The superintendent and helper furnished by plaintiff do not perform work over and above that required by the inherent nature of the steel buildings which are the subject of the sale. The steel buildings sold by plaintiff are such as are used in the trade generally and might be sold to any customer in the regular course of business. They are capable of being dismantled and moved to and reinstalled at other sites.

6. When repair parts cannot be obtained from the stock maintained in Phoenix, Arizona by Food Machinery and Chemical Corporation, plaintiff ships gin repair parts to customers in Arizona f.o.b. Dallas or Fresno. Such sales of repair parts to Arizona customers are made pursuant to orders therefor received and accepted in Dallas or Fresno.

7. During the period from January 1st, 1954 to September 30th, 1956, plaintiff made sales to Arizona customers as disclosed by the following schedule:

| | Gin Machinery Contracts | Steel Building Contracts | Repair Part Sales Dallas | Repair Part Sales Fresno | Totals |
|---|---|---|---|---|---|
| | 945,834.44 | 62,396.33 | 9,043.27 | 171,239.31 | 1,189,621.62 |
| Less: | | | | | |
| Frt & Erec. | | 8,182.73 | | | |
| | | 54,213.60 | | | |

| | | | | | |
|---|---|---|---|---|---|
| Sales on which tax was paid | 348,286.94 | 10,175.10 | 6,221.77 | 78,180.67 | 442,864.48 |
| Sales on which tax was not paid | 597,547.50 | 44,338.50 | 2,821.50 | 93,049.64 | 737,757.14 |
| 2% of sales on which tax not paid | 11,950.95 | 886.77 | 56.43 | 1,861.00 | 14,755.15 |

8. With respect to the gin machinery contracts totalling $945,834.44 referred to in paragraph 7 hereof, the services of an erector were supplied by plaintiff with respect to the following sales only:

| Date | Name of Purchaser | Invoice No | Net Sale Price | Erectors' Expense Billed to Customer Time | Expense |
|---|---|---|---|---|---|
| 8 9 54 | Ariz. Cotton Gin-Mesa | 8423 | $90,660.40 | 1,755.00 | 594.54 |
| 8 26 54 | Community Gin-Glendale | 10378 | 2,329.97 | 149.00 | 4.00 |
| " | " " | 8268 | 2,329.97 | 149.00 | 4.00 |
| 6 15 54 | Gila Gin-Gila Bend | 4582 | 4,855.26 | 57.00 | 56.75 |

| | | | | | |
|---|---|---|---|---|---|
| 4 26 54 | Producers C O Maricopa | 2515 | 72,956.66 | 1,146.00 | 353.50 |
| 10 22 54 | Producers C O Chandler | 15717 | 85,316.77 | 1,209.00 | 437.00 |
| 8 22 55 | Chandler Gin | 9993 | 104,319.50 | 1,518.00 | 240.60 |
| 6 6 55 | Marana Gin-Marana | 4206 | 18,360.13 | 1,593.00 | 714.30 |
| 5 28 56 | Casa Grande Gin-Casa Grande | 4231 | 132,241.00 | 1,410.00 | 373.96 |
| 4 16 56 | Gila Gin-Gila Bend | 1584 | 16,367.55 | 282.00 | 157.91 |
| 3 30 56 | Harris C G-Chandler | 2077 | 10,355.00 | 36.00 | 8.30 |
| 6 28 56 | Producers C O Greenfield | 5851 | 5,774.10 | 332.00 | 124.10 |

9. In all cases in which plaintiff's customers paid to it an amount to cover sales tax in addition to the purchase price, plaintiff paid to defendant the sales tax incident to such transactions. Plaintiff failed to remit sales tax to defendant only in connection with those transactions where plaintiff's customers did not pay the tax, or an additional amount to cover the tax.

10. During the period covered by the sales referred to in paragraph 7 hereof plaintiff employed Joe E. May as an erector to perform work incident to the installation of gin machinery where requested by the purchaser. Mr. May is employed by, receives direction from and reports to plaintiff's Fresno branch. Mr. May resides in Phoenix, Arizona. His pay check and other mail from the Fresno branch is received at his residence. In addition to performing work as an erector Mr. May also en-

gages in the repairing of gins at the request of customers. Most of the calls from customers requesting his services are received at his residence in the evening. Some calls for his services are made to Food Machinery and Chemical Corporation. Such calls are received by Mr. W. J. Simmons or by Mr. J. F. Jodis and then relayed to Mr. May either by telephone in the evening or when Mr. May would next call at the Food Machinery office. Work or time sheets with respect to the services performed by Mr. May are prepared by him and forwarded direct to plaintiff's Fresno office. Mr. May is compensated by plaintiff upon the basis of services performed with a minimum monthly guarantee. Mr. May is furnished an automobile by plaintiff and he is reimbursed by plaintiff for all gas, oil and other expenses incident to the operation of the automobile. Mr. May furnishes his own hand tools.

EVANS, KITCHEL & JENCKES

By: JOS. S. JENCKES, JR.
Attorneys for Plaintiff

ROBERT MORRISON
The Attorney General

By: BERNARD T. CAINE
Bernard T. Caine
Assistant Attorney General
Attorneys for Defendant

(A.R. 13-22)

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter came on for trial before the Court sitting without a jury on the 31st day of October, 1958. The matter was submitted upon the Stipulation heretofore filed herein on the 11th day of June, 1958, the Memoranda of law submitted by respective counsel, and the oral arguments thereof. The Court being fully advised in the premises enters its Findings of Fact and Conclusions of Law as follows:

## FINDINGS OF FACT

The Court finds as a matter of fact:

1. By reference the Court adopts and herein incorporates all of the facts set forth in the Stipulation entered into between the respective parties and filed herein on the 11th day of June, 1958.

2. On or about December 17, 1956, defendant purported to determine that there was due and owing from plaintiff to defendant under the provisions of the Excise Revenue Act of 1935, as amended (Section 421301, A.R.S., et seq.) additional taxes in the amount of $14,213.29 by reason of business done by plaintiff during the period from January 1st, 1954, to the 30th day of September, 1956 (hereinafter referred to as the period involved herein). Within the time provided by Section 42-1338, A.R.S., plaintiff applied to defendant by petition in writing for a hearing, correction or redetermination of the aforesaid action taken by the defendant. Pursuant to such application the matter was heard by defendant on or about February 1st, 1957, and thereafter on or about the 28th day of February, 1957, defendant rejected the petition of plaintiff and refused to make a reduction, correction, or redetermination of such assessment.

3. On or about the 22nd day of March, 1957, plaintiff paid to defendant under protest purported additional assessment in the amount of $14,213.29 and delivered to defendant pursuant to the provisions of Section 42-1339, A.R.S., a written protest in form and substance as required by said section.

4. This action was instituted by plaintiff against defendant pursuant to the provisions of Section 42-1339, A.R.S.

5. During the period involved herein Food Machinery & Chemical Corporation permitted plaintiff's sales representative, W. J. Simmons, to use a desk and one of the telephones at its office in Phoenix, Arizona. In the classified section of the Phoenix Telephone Directory under the general heading

"Cotton Gin Machinery", appeared a listing "Murray Gins Parts Sales & Service—Food Machinery & Chemical Corp., 1450 E. Henshaw Rd.—Alpine 4-7118." This listing was arranged and paid for by Food Machinery & Chemical Corporation. Immediately under such listing appeared: "Simmons, W. J., 3601 N. 49 Scottsdale, Whitney 5-1151." The last mentioned listing was arranged and paid for by Mr. Simmons. The charges for the use of such telephone were included on Mr. Simmons' expense account and paid for by plaintiff.

6. During the period involved herein plaintiff did not in the State of Arizona:

(a) Maintain a local retail establishment;

(b) Sell to customers in the State of Arizona items maintained in stock by plaintiff in the State of Arizona;

(c) Maintain an office which was rendering services to local customers which were factors in establishing and holding its Arizona market;

(d) Elect to localize itself in the Arizona market with the advantages of a retail outlet in the State;

(e) Channel business through a local outlet to gain the advantage of a local business.

7. Plaintiff's transactions described in the aforesaid Stipulation were interstate in nature and not associated with any local business being conducted by plaintiff in the State of Arizona.

8. During the period involved herein plaintiff approached the Arizona market through solicitors only.

9. During the period involved herein all sales activities conducted by plaintiff in the State of Arizona were confined to the promotion or stimulation of sales exclusively in interstate commerce.

## CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact the Court concludes as a matter of law:

1. During the period involved herein plaintiff did not engage in any local business activities in the State of Arizona which would subject it to a tax imposed upon the privilege of engaging in the business of selling tangible personal property at retail.

2. The State of Arizona may not impose upon plaintiff a tax for exercising in the State of Arizona the privilege of engaging in interstate commerce.

3. The activities of plaintiff, its employees and representatives in the State of Arizona during the period involved herein, including the listing by plaintiff's sales representative of his telephone number in the classified section of the City of Phoenix Telephone Directory under the general heading "Murray Gins Parts Sales & Service" were incident to the promotion or stimulation of sales exclusively in interstate commerce and therefore did not subject plaintiff to taxation under the provisions of the Excise Revenue Act of 1935, as amended (Section 42-1301, A.R.S., et seq.).

4. The State of Arizona cannot impose a tax upon the privilege of soliciting interstate business.

5. The contracts entered into by plaintiff, as described in the aforesaid Stipulation, for the sale and shipment of machinery and other products from out of the State into Arizona were interstate commerce, and incidental services performed by plaintiff in assembling, erecting, inspecting and testing such machinery in the State of Arizona did not deprive said contracts of their interstate character.

6. The agreement of plaintiff to furnish, at the request of a customer, an erector who would supervise the assembling, installation and testing of gin machinery sold to the customer

was a relevant and appropriate part of the sale and the entire transaction was one of interstate commerce.

7. The agreement of plaintiff to furnish a superintendent and one helper to assist the customer in assembling steel buildings sold to him, was a relevant and appropriate part of the sale and the entire transaction was one of interstate commerce.

8. The assessment by defendant of additional taxes upon plaintiff in the amount of $14,213.29 constitutes a burden upon interstate commerce contrary to and in violation of the provisions of the Constitution of the United States, is contrary to the express provisions of subdivision A.4. of Section 42-1321, A.R.S., is illegal and void.

9. Plaintiff is entitled to judgment against defendant in the amount of $14,213.29 together with interest thereon at the rate of 6% per annum from March 22, 1957, until paid, together with plaintiff's costs of suit incurred and expended herein. The Clerk of this Court is hereby ordered to enter judgment for plaintiff accordingly upon payment of the judgment fee.

Done in Open Court this 23 day of December, 1958.

CHARLES C. BERNSTEIN
JUDGE

Copy of the Foregoing Findings of Fact and Conclusions of Law received this ..... day of December, 1958.

ROBERT MORRISON
The Attorney General

By .....
Attorneys for Defendant

(A.R. 74-82)